

COMPLIANCE BOARD OPINION NO. 99-4
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April 20, 1999

Ms. Linda M. Nessul
Dr. Thomas B. Dillingham

The Open Meetings Compliance Board has considered your complaint of January 27, 1999, as supplemented on March 11, 1999, in which you alleged that the Commissioners of Poolesville violated the Open Meetings Act during a closed session on January 19, 1999. The gist of your complaint is that the Commissioners discussed a matter that was beyond the scope of the exceptions relied on to justify the closing of the session. Responding on behalf of the Commissioners, President Andrew W. Johnson and Town Attorney Charles Rand denied that a violation occurred. Their position is that the discussion stayed within the bounds of one exception applicable to discussions of specific personnel matters.

The Compliance Board faces a dilemma when, as here, people who were in the same place at the same time have dramatically different perceptions of what occurred. Because the Compliance Board has no investigatory power with which to try to establish the facts, we can offer no opinion on the legality of the challenged discussion at the January 19 meeting.

A few things are undisputed. The Commissioners had a proper basis for closing the session, because they planned to discuss certain pending litigation and, to quote the complaint, "the lack of performance of a Town contract employee and a strategy for his replacement." The litigation discussion could be closed pursuant to §10-508(a)(7) and (8) of the State Government Article, Maryland Code; the employee performance discussion, pursuant to §10-508(a)(1). It is also undisputed that, while in closed session, the Commissioners had some discussion about the manner in which publication of the Town newsletter had been handled in the past and should be handled in the future.

What is sharply disputed, however, is whether this discussion of the newsletter was a phase in the formulation of a new policy about supervision of the newsletter, as the complaint has it, or was merely a discussion focused on one aspect of the Town Manager's job, namely his role in publishing the newsletter, as President Johnson and Mr. Rand contend. President Johnson and Mr. Rand lay great emphasis on the formally adopted minutes of the closed session on January 19, which indicate that the discussion about the newsletter was limited to a discussion about the Town Manager's role. The complainants, on the other hand,

contend that these minutes do not accurately reflect the true nature of the discussion. Rather, they say, the discussion involved a rebuke of Commissioner Dillingham for material that he had published in the newsletter and a policy-oriented discussion about shifting responsibility for the newsletter. President Johnson, for his part, explicitly denied that Commissioner Dillingham had been rebuked or that policy was discussed.

As we have pointed out before, the Compliance Board “is not an adjudicatory body with compulsory process or other tools for conducting a factual inquiry. The Board has no way to resolve differing recollections among the participants of the exact nature of the discussion at [a] closed session ...” Compliance Board Opinion 94-8 (October 26, 1994) *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 101, 102. *See also* Compliance Board Opinions 97-15 (September 23, 1997) *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 255, 256 and 94-1 (March 22, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 56, 58.

If the complainants’ version of events at the January 19 meeting is correct, the Act was violated, because a public body may not hold a discussion that exceeds the scope of the exceptions that justify closing a session. *See, e.g.,* Compliance Board Opinion 96-6 (May 16, 1996), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 169, 170. A discussion of overall policy on the publication of a municipal newsletter, the prerogative of commissioners to publish what they want, the pros and cons of alternative methods of supervision – these are not “personnel matters that affect ... specific individuals.” If, however, the discussion was as limited as President Johnson and the approved minutes indicate, there was no violation. A mere reiteration that an employee has a particular job responsibility and should carry it out diligently is within the scope of the personnel exception. It is immaterial, under this view of the facts, that the Commissioners invoked the exception to discuss one employee’s performance and then, while in closed session, discussed a second employee. So long as the latter discussion was confined to specific personnel matters, the Act permitted a closed session.

Given the differing versions of what happened, the Compliance Board can issue no opinion whether the Act was violated.

OPEN MEETINGS COMPLIANCE BOARD

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